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NO. 95-1882

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CALIFORNIA, Petitioner

vs.

JESS RODERICK MITCHELL, Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

SIXTH DISTRICT APPELLATE PROGRAM

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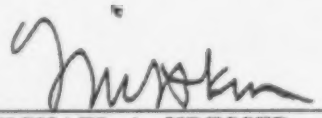
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Jess Roderick Mitchell, asks leave to file a brief in opposition to petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis. The brief was sent to this court from the office of associate counsel Renee Torres. Respondent was declared indigent in both the California Superior Court and the California Court of Appeal, Sixth Appellate District, and counsel was appointed to represent him in both courts. Petitioner's affidavit in support of the motion is not attached hereto, for the reasons set forth below.

An affidavit in support of motion for leave to proceed in forma pauperis was sent from counsel to respondent, who is incarcerated at Pleasant Valley State Prison, in Coalinga, California. Due to various problems in getting respondent's signature notarized in the institution,

the document was not notarized and mailed until today's date, September 11, according to respondent's prison counselor. Upon receipt, I will tender the affidavit to the court, with a proof of service on opposing counsel.

Dated: September 11, 1996



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PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 100 N. Winchester Blvd., Suite 310, Santa Clara, California 95050. On the date shown below, I served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS to the following parties hereinafter named by:

__ Causing a true copy thereof to be delivered to the office of each party shown below at the address indicated by leaving the same with a person apparently in charge and over the age of 18 years.

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

Jeremy Friedlander
Deputy Attorney General
Attorney General's Office
50 Fremont Street
Suite 300
San Francisco, CA 94105-2239

I declare under penalty of perjury the foregoing is true and correct. Executed this 11th day of September, 1996, at Santa Clara, California.

Sue Yarbrough

No. 95-1882

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CALIFORNIA, Petitioner

v.

JESS RODERICK MITCHELL, Respondent

Petition for Writ of Certiorari to the
California Court of Appeal for the Sixth Appellate District

BRIEF IN OPPOSITION

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APPENDICES TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Documents filed in the California Court of Appeal, Sixth Appellate District, in *People* v. *Mitchell*, H018725

Appx. A — Excerpt of Appellant's Opening Brief (pp. 55-57, 52-53), dated March 12, 1995

Appx. B — Excerpt of the State's Respondent's Brief (pp. 47, 44-46), dated May 24, 1995

Appx. C — Court of Appeal notice, setting oral argument for October 3, 1995

Documents filed in the California Supreme Court in *People* v. *Kobrin*, S036656

Appx. D — Letter from the California Supreme Court to counsel, dated June 20, 1995, soliciting supplemental briefs

Appx. E — Excerpt from the State's Respondent's Supplemental Brief on the Merits (pp. 1-3, 12), filed July 5, 1995

Appx. F — Excerpt from Kobrin's Second Supplemental Brief on the Merits (pp. 14-18), filed July 12, 1995

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No. 95-1882

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CALIFORNIA, Petitioner

v.

JESS RODERICK MITCHELL, Respondent

Petition for Writ of Certiorari to the
California Court of Appeal
for the Sixth Appellate District

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the California Court of Appeal for the Sixth Appellate District in *People v. Mitchell*, H012785, is unpublished. It is reproduced in Petitioner's Appendix A at pages 1 through 26. The portion of the opinion relevant to the question presented is at pages 23 and 24.

JURISDICTION

The Court of Appeal's opinion, affirming all of respondent's convictions save for his conviction of perjury, was filed December 19, 1995. No petition for rehearing was filed in that court. A petition for review in the California Supreme Court was denied on March 27, 1996. Pet. Appx. B. Petitioner has invoked this Court's jurisdiction under 28 U.S.C. § 1257(a). However, for the reasons discussed in Part I, *infra*, respondent submits that this Court lacks jurisdiction because petitioner did not present its harmless error theory to the tribunal that actually decided the case, the California Court of Appeal for the Sixth District. Alternatively, on the same ground, this Court should decline to exercise jurisdiction for prudential reasons.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2:

"The trial of all crimes, except in cases of impeachment, shall be by jury."

United States Constitution, Amendment 5: "No person shall be ... deprived of life, liberty, or property without due process of law...."

United States Constitution, Amendment 6: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...."

United States Constitution, Amendment 14: "No state shall . . . deprive any person of life, liberty, or property, without due process of law...."

California Constitution, Article I, section 16: " Trial by jury is an inviolate right and shall be secured to all...."

California Constitution, Article VI, section 13: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, ... unless ... the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

California Penal Code, section 118: "Every person who. . . testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury." Cal. Pen. Code § 118 (West. 1996).

California Rules of Court, Rule 29: "Grounds for Review in Supreme Court. . . . (b) [Limitations] As a matter of policy, on petition for review the Supreme Court normally will not consider: (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal; (2) any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing." Cal. Rules of Court, rule 29(b) (West. 1996).

STATEMENT OF THE CASE[1]

Respondent was charged in a ten-count information with robbery, attempted murder, assault with a firearm, auto theft, possession of stolen property, fraudulent use

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[1] Respondent only briefly summarizes the salient procedural and historical facts above. For a more detailed account, see the Court of Appeal's rendition. See Pet. Appx. A at pages 2 through 6.

of an access card, carrying a loaded and concealed firearm in a car, and perjury in applying for a driver's license. He represented himself at trial and was convicted by a jury of all counts. He was sentenced to a total term of 14 years in state prison. According to the Court of Appeal's opinion, he was not sentenced on the perjury conviction. See Pet. App. A, p. 2. On appeal, respondent's perjury conviction was reversed; his conviction for fraudulent use of a credit card was reduced to a misdemeanor; the matter was remanded for redetermination of restitution; and the judgment was otherwise affirmed in toto.

On September 8, 1992, respondent and a confederate, who had previously successfully stolen a car together, followed a Lexus to an auto dealer's auction lot. They stole a briefcase from the trunk of the car. The briefcase contained credit cards, which they used to buy wheels and tires for the confederate's car. When they returned to the store to pick up their merchandise, the police were waiting for them. Inside the van in which respondent was apprehended, the police found a semiautomatic handgun.

Incidentally, the police discovered that respondent had applied for two California driver's licenses under different names. Fingerprint evidence linked respondent to both license applications. At trial, respondent admitted that he had permitted a credit agency, which was helping him with his credit problems, to apply for a driver's license for him under a different name, and had provided that company with the information which appeared on the driver's license application, but he denied filling out the application or signing it. When he went to DMV he was told to "sign [his] name as such-and-such, Jess Willard, and take a thumbprint, do the picture, and things to that effect," which he did.

The jury was instructed that if it found respondent made certain statements, those statements were material, as matter of law.[2]

On appeal to the Sixth Appellate District, respondent argued that the trial court should have permitted the jury to decide the question of materiality instead of informing them that materiality had been decided by the court against respondent, and that the error was reversible per se. See Appx. A (attached). Petitioner responded only that

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[2] The court instructed the jury as follows:

> " . . . Count ten alleges a violation of the California Penal Code section 118, perjury, defined as follows: every person who declares on any driver's license application under penalty of perjury and willfully states as true any *material matter* [emphasis added] which is false and which such person knows to be false is guilty of the crime of perjury in violation of section 118 of the California Penal Code.
>
> "In order to prove this crime, each of the following elements must be proved: one, a person declared under the penalty of perjury that the driver's license application was true and correct with knowledge that the statement was made under penalty of perjury. Two, the declaration under penalty of perjury was committed [sic: "permitted"] by law. Three, such person declared as true a matter which was false and which such person knew was false. And four, such person had the specific intent to declare falsely under penalty of perjury.
>
> "It is alleged that the defendant made the following false statement in this case. That he had never before had a California's driver's license, that he had not applied for a California driver's license under a former or a different name within the past five years[,] and that he gave a false name. *If you find that the defendant made one or more of the statements as charged, such statements were material matters within the definition of perjury . . . .*" [Emphasis added]. Cert. Pet. pp. 5-6.

under California law, there was not error. See Appx. B (attached). Thereafter the Court of Appeal filed its opinion holding that the instruction was error and reversible per se, based on *People* v. *Kobrin*, 11 Cal.4th 416; 45 Cal.Rptr.2d 895; 903 P.2d 1027 (1995), which had been decided by the California Supreme Court after briefing and oral argument in *Mitchell* were complete. No petition for rehearing was filed. A petition for review in the Supreme Court was denied and this petition follows.

REASONS FOR DENYING THE WRIT

The State of California hopes to persuade this Court to issue a writ of certiorari to an intermediate appellate court on an issue which the Attorney General never contested before that court; on a theory of harmless error which is inconsistent with this Court's opinions and was exhaustively litigated in, and rejected by, the California Supreme Court *People v. Kobrin, supra*, where the Attorney General declined to seek certiorari; and in a case in which respondent's liability for perjury was almost meaningless in the grand scheme of things. Thus, even assuming the time has come for this Court to "correct basic, widespread errors" (Cert. Pet. p. 15) in appellate courts' harmless error review, this is manifestly not the case in which to attempt such a task. For there are at least four good reasons why this court should deny the writ.

First, the State has not properly preserved the issue it wishes this court to resolve, because in the California Court of Appeal petitioner never argued that the error in this case was harmless. Second, the *Kobrin* opinion -- which is the true target of petitioner's wrath, and on which the intermediate court below exclusively relied -- rests as much on independent state grounds as on federal notions of harmlessness. Third, as a matter of

federal jurisprudence, it has been clear at least since *Carpenters v. United States*, 330 U.S. 395, 408-409 (1947), that directed verdicts against a criminal defendant are simply incompatible with the Constitution, no matter how overwhelming the evidence of the defendant's guilt, and the court's instruction here was nothing less than a directed verdict on an element of the offense of perjury. Finally, because this is a case of a directed verdict, it is a poor vehicle indeed for providing reviewing courts with guidance on (1) an instruction which omits an element of the offense, or (2) conflicting instructions which may withdraw an element of the offense from the jury's consideration, or (3) an instruction which obscures "only an aspect of an element." *People v. Cummings*, 4 Cal.4th 1233, 1315; 18 Cal.Rptr.2d 796; 850 P.2d 1 (1993), cert. den., ___ U.S. ___, 114 S.Ct. 1576 (1994).[3] For any of these reasons or all of them, the writ should be denied.

I.

PETITIONER FAILED TO PRESERVE ITS FEDERAL CLAIMS DURING THE STATE APPELLATE PROCEEDINGS.

A. Petitioner's Default in the State Appellate Proceedings

The state, as petitioner, seeks a writ of certiorari directed to the California Court of Appeal for the Sixth Appellate District *based on arguments the state never presented, in any fashion, to that court*. As discussed further below, in the briefing before the state appellate court, petitioner defended the perjury conviction solely on the ground that the

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[3] But see *Masotto v. United States*, 73 F.3d 1233 (2nd Cir. 1996), petition for certiorari, No. 95-1794, pending.

trial court's removal of the materiality element from the jury was correct. At no time did petitioner suggest to the Sixth District, even as an alternative or "fallback" argument, that any error in the perjury instructions was susceptible to harmless error analysis. Indeed, even after the state appellate court issued its decision finding the removal of this element from the jury reversible, the state passed up an opportunity to present its harmless error claims to that court through a petition for rehearing. Instead, the state raised these arguments for the first time in its petition for review to the California Supreme Court. But California appellate law (like that of most jurisdictions) does not permit a litigant to raise before the state's highest court claims which it has failed to present to the intermediate appellate court. Accordingly, petitioner failed to preserve its current federal claims properly in the lower state courts, the California Supreme Court never excused that default or otherwise ruled on the merits, and this Court should not entertain these defaulted claims on certiorari.

The petition for certiorari conspicuously omits the required "specification of the stage of the proceedings" in which petitioner first raised "the federal questions sought to be reviewed" and does not "show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Supreme Ct. Rule 14.1(g)(i); compare Cert. Pet. pp. 2-6.[4] The relevant chronology is as

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[4] The petition does state, rather disingenuously, "We contend here, *as we did in state court*, that the error was harmless." Cert. Pet., p. 7, emphasis added. As discussed above in text, the only "state court" to which petitioner presented that contention was the California Supreme Court which, at that late stage of the proceedings, was not required to and presumably did not consider that contention on the merits.

follows: The original briefing in the California Court of Appeal occurred after this Court's grant of certiorari but before its decision in *United States* v. *Gaudin*, 515 U.S. ___, 115 S.Ct. 2310 (1995). Both parties alluded to the pendency of *Gaudin* in their respective briefs. Mitchell, relying in part on the Ninth Circuit's en banc opinion in *Gaudin*,[5] argued that the judge's removal of the materiality question from the jury violated the Sixth and Fourteenth Amendments, *and Mitchell explicitly urged that the error was a structural defect which was not susceptible to harmless error analysis.*[6] In its one-page response to this argument, the state (on the basis of California precedents) claimed only that "[t]he trial court did not err" in removing the materiality question from the jury.[7] Nowhere in its perfunctory response did the state suggest that, in the event the removal was found erroneous, the perjury verdict could nonetheless be salvaged through some form of harmless error analysis. In electing not to respond to Mitchell's argument that the erroneous removal of an element of an offense is reversible per se, the state effectively acquiesced in that point before the state appellate court.

This Court rendered its decision in *Gaudin* on June 19, 1995, and, in a case then pending before the California Supreme Court, the California Attorney General explicitly conceded that *Gaudin* applied to California's perjury statute and mandated jury

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[5] *United States* v. *Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc), cert. gr., ___ U.S. ___, 115 S.Ct. 713 (1995).

[6] Appx. A (attached): Excerpt of Mitchell's Appellant's Opening Brief in Sixth Appellate District (pp. 55-57).

[7] Appx. B (attached): Excerpt of state's Respondent's Brief in Sixth Appellate District, p. 47.

determination of the materiality element. See *Kobrin, supra*.[8] Thus it was a foregone conclusion that the removal of that element from Mitchell's jury would be found erroneous. The Sixth Appellate District did not hear oral arguments in the *Mitchell* appeal until October 3 (Appx. C [attached]) and did not issue its opinion until December 19, 1995. Hence, if the state wished to change or supplement its "no error" argument with one of harmless error, it had plenty of time to do so. Yet the state never submitted any supplemental briefing in *Mitchell*. Even after the Sixth District issued the opinion, the state did not avail itself of the opportunity to present any such harmless error arguments to that court through a petition for rehearing.

It was not until the state's petition for review in the California Supreme Court that the state first asserted that the trial court's removal of the materiality element in this case was harmless error. The California Supreme Court's summary denial of the state's petition should come as no surprise, for the state had defaulted its harmless error arguments by failing to present them to the Sixth Appellate District either before or after the appellate court's opinion.

> As a matter of policy, on petition for review the [California] Supreme Court normally will not consider: [¶] (1) *any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal*; [¶] (2) *any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing*. All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing.

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[8] The state made this concession in a "Respondent's Supplemental Brief on the Merits" (p. 3), filed July 5, 1995, in the California Supreme Court, in *People* v. *Kobrin*, S036656. Appx. D (attached)

Cal. Rules of Court, Rule 29(b), emphasis added.

On the basis of Rule 29(b), the California Supreme Court routinely refuses to consider arguments which were not properly raised in the intermediate appellate court.[9]

Because the state's failure to argue harmless error to the Sixth Appellate District defaulted that argument for purposes of California Supreme Court review, that omission defaulted its present federal claims for purposes of this Court's certiorari review as well. As this Court has stated many times, "when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."" *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 fn. 3 (1983), quoting *Fuller* v. *Oregon*, 417 U.S. 40, 50 fn. 11 (1974), and *Street* v. *New York*, 394 U.S. 576, 582 (1969).

This Court has specifically held that presentation of an argument for the first time in a petition to a state's highest court is insufficient to preserve an argument, especially where the state supreme court has a policy of not reviewing arguments not asserted in the lower court. *Bailey* v. *Anderson*, 326 U.S. 203, 206-207 (1945).[10] Indeed, this Court

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[9] See e.g., *Conservatorship of Susan T.*, 8 Cal.4th 1005, 1012-1013; 36 Cal.Rptr.2d 40; 884 P.2d 988 (1994); *People* v. *Bransford*, 8 Cal.4th 885, 893 fn. 10; 35 Cal.Rptr.2d 613; 884 P.2d 70 (1994), cert. den., ___ U.S. ___, 115 S.Ct. 2005 (1995); *Brown* v. *Poway Unified School Dist.*, 4 Cal.4th 820, 828 fn. 3; 15 Cal.Rptr.2d 679; 843 P.2d 624 (1993).

[10] For similar reasons, this Court has held that presentation of an argument for the first time in a petition for discretionary review by a state's highest court does not constitute "fair presentation" of a federal claim for purposes of determining whether a habeas petitioner has exhausted state remedies. See *Castille* v. *Peoples*, 489 U.S. 346, 351 (1989).

recently invoked that principle in another case arising from the California courts. *Yee* v. *City of Escondido, California*, 503 U.S. 519, 533 (1992). An argument belatedly raised in a state's highest court is only cognizable on certiorari where the state supreme court explicitly decided the issue on the merits, despite the omission in the lower courts.[11] But that exception cannot revive petitioner's harmless error claim because, as this Court correctly observed in *Yee*, the California Supreme Court's denial of discretionary review (much like a certiorari denial) does not represent a decision on the merits. *Yee, supra*, 503 U.S. at 533.

These rules requiring adequate preservation of an argument throughout the state proceedings "are as applicable to the State's failure to have opposed the assertion of a particular federal right, as to a party's failure to have asserted the claim." *Illinois* v. *Gates*, 462 U.S. 213, 221 (1983). In *Gates*, the state had defended the sufficiency of the warrant in the state courts but had never disputed the defendant's claim that the exclusionary rule would apply if the warrant was found lacking in probable cause. Since the question of the appropriate relief or disposition had not been fully litigated in the state courts, this Court ultimately found that the question of a possible good-faith exception to the exclusionary rule was not properly before it (despite its earlier solicitation of briefing on that issue). *Id*. at 217-223.[12]

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[11] E.g., *Schad* v. *Arizona*, 501 U.S. 624, 630 fn. 2 (1991).

[12] "In such circumstances, absent the adversarial dispute necessary to apprise the state court of the arguments for not applying the exclusionary rule, we will not consider the question whether the exclusionary rule should be modified." *Gates, supra*, at 223.

The same is true here: The state's only response to Mitchell's appellate claim of reversible error was a perfunctory assertion that no error occurred. Because the state's briefing in the Sixth District never disputed that, if error occurred, it was reversible, "there was never 'any real contest' upon the point." *Gates*, *supra*, 462 U.S. at 223.

Gates also illustrates the interplay between the requirement of adequate preservation in the state courts and the doctrine of independent state grounds--a consideration also present in this case. (See Part III, *infra*) "[B]y requiring that the state first argue to the state courts that the federal exclusionary rule should be modified, we permit a state court, even if it agrees with the State as a matter of federal law, to rest its decision on an adequate and independent state ground. [Citation]" *Gates*, *supra*, at 222. This consideration should deter the Court from granting certiorari even if it is uncertain whether the current record demonstrates reliance on an alternative state ground. By failing to argue to the Sixth District that the federal constitutional error was harmless, the state deprived that court of the opportunity to consider and to state explicitly whether the error was nonetheless reversible under the California Constitution.[13]

B. The State's Bypasses--*Kobrin* and *Mitchell*

This is a stealth petition. As reflected in the amount of text petitioner devotes to the case, the true object of the state's challenge is the California Supreme Court's November 1995 opinion in *People* v. *Kobrin*, *supra*. See Cert. Pet. pp. 15-18, 22-26. In

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[13] As discussed in Part III, *infra*, a long line of California opinions have recognized a state "constitutional right to have the jury determine every material issue." And, in enforcing that right, the California courts have generally applied a test of reversal which is much less forgiving of error than the federal tests for comparable errors.

contrast to *Mitchell*, *Kobrin* was a case in which the structural defect or harmless error questions were joined, briefed, and decided on the merits. The California Supreme Court solicited and received extensive briefing from both parties on whether the removal of materiality from the jury was reversible per se or susceptible to harmless error analysis and, if the latter, what form such harmless error analysis should take. See Appx. D, E, F.

Kobrin was a published opinion of the state's highest court, following a "'real contest'" and "adversarial dispute" on harmless error, of the type so lacking in the Sixth District proceedings in *Mitchell*. Cf. *Gates*, *supra*, 462 U.S. at 223. But, for reasons best known to itself, the state elected *not* to petition for certiorari in *Kobrin*. Instead, it has selected this obscure, unpublished opinion of an intermediate appellate court--to which the state never presented any of the arguments which are the basis of its certiorari petition.

The state bypassed the opportunity to bring these claims before this Court in *Kobrin*, a case in which its harmless error theories had been raised and fully considered in state court. And the state bypassed the opportunity to assert any such theories in the state appellate court in *Mitchell*. Apparently, the state would prefer to present its novel revision of structural defect and harmless error principles to this Court in a case in which the issue was not fully developed in the state courts. There is no place for such gamesmanship in this Court's certiorari process. Regardless of whether this Court views the bar on inadequately preserved claims as a jurisdictional or a prudential one, it should deny certiorari. See *Yee*, *supra*, 503 U.S. at 533; *Gates*, *supra*, 462 U.S. at 218-222.

II.

THE STATE'S INVENTIVE THEORY OF HARMLESSNESS IS INCONSISTENT WITH THIS COURT'S PRECEDENTS AND WITH THE SIXTH AMENDMENT'S GUARANTEE OF A JURY TRIAL

In its petition for certiorari, the State argues that both the California Supreme Court in *Kobrin* and the court of appeal in this case were wrong to apply a per se reversal standard to the instructional error at issue, and pe itioner proposes a harmless error model of its own devising for this Court's adoption. Stripped of its idiosyncratic "buzz words" which do not appear in any published opinion (" Jury-Findings, Evidence-Considered Test;" "Error Characterization Approach"), the State's "universal, three-step approach to analyzing instructional errors on elements of an offense," (Cert. Pet. pp. 7, 8, 10, 11, 16) turns out to be this: whether a jury was affirmatively told *not* to consider an element, or was merely not told about an element, or was given conflicting instructions on an element, a reviewing court can hold the error harmless if it finds, from "what the jury *actually did* (the findings the jury made and the evidence it considered) what the jury *would have done* (i.e., whether it would still have convicted) if had been correctly instructed." (Cert. Pet. p. 7) While this formulation sounds reminiscent of tests this Court has articulated for *rebuttable* presumptions in *Yates* v. *Evatt*, 500 U.S. 391 (1991) and *Rose* v. *Clark*, 478 U.S. 570 (1986), upon further parsing it appears that the true test petitioner proposes is this: despite the error,

> "could the jury nonetheless have made findings and considered evidence that *would* establish that the jury that *would have made* the requisite findings *if* it had been properly instructed" (Cert. Pet. p. 8, emphasis in original; italics added), and

> "did the jury nonetheless actually make findings and consider evidence establishing that the jury *would have made* the requisite findings *if* it had been properly instructed." (Id., at pp. 9-10, italics added.)

In other words, *any* instructional error that removes an element of the offense from the jury's consideration is harmless if the reviewing court can determine from what the jury found (i.e., what can be inferred from the guilty verdict) that the evidence is so overwhelming ("establishes") that any reasonable jury would have found the element, if it had been asked to do so, even though the jury, in fact, was not asked to do so.

This harmless error approach to instructions which entirely remove an element of the offense from the jury's consideration is not even as solicitous of the Sixth Amendment jury trial right as the test this Court has set out for rebuttable presumptions (which do not remove elements but merely shift the burden of proof). *Yates* instructs us that before deciding that an error did not contribute to the verdict, the reviewing court

> "must ask what evidence the jury actually considered in reaching its verdict. . . The answer must come [] from analysis of the instructions given to the jurors and from application of that customary presumption *that jurors follow instructions* and, specifically, that they consider relevant evidence on a point in issue when they are told that they may do so. . . . [I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone. To satisfy *Chapman's* reasonable-doubt standard, *it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption.* Rather, the issue under *Chapman* is whether the jury *actually rested it: verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption*. 500 U.S. at 404, emphasis added.

This Court then took pains to correct a common but erroneous assumption made by appellate courts in applying *Chapman's* "review of the entire record" test: "that the

jury considered all the evidence bearing on the issue in question before it made the findings on which the verdict rested."

> If, on the contrary, that assumption were incorrect, an examination of the entire record would not permit any sound conclusion to be drawn about the significance of the error to the jury reaching the verdict. This point must always be kept in mind when reviewing erroneous presumptions for harmless error, because the terms of some presumptions so narrow the jury's focus so as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to the infer the presumed." 500 U.S. at 405.

Although this Court need not have done so, since it did not have before it a conclusive presumption, in a footnote the Court nevertheless observed that in such a case an even more restrictive analysis had been proposed by Justice Scalia in *Carella v. California*, 491 U.S. 263 (1989). That test would narrow the inquiry to only the predicate facts to be relied on under the presumption and would require a court to determine whether "they are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact." *Yates, supra*, 500 U.S. at 405, fn. 10 citing *Carella, supra*, 491 U.S. at 271.

The *Chapman* tests of harmless error, even as articulated in *Yates* and *Rose*, is primarily informed by solicitude for the Fifth and Fourteenth Amendments' guarantee of the due process right to proof beyond a reasonable doubt of every fact upon which every element of an offense depends. *In re Winship*, 397 U.S. 358 (1970). It is not, however, the only right at stake, when a jury is instructed not to find an element of the offense. As this Court has repeatedly pointed out, also at stake is the right to have the *jury* make the required findings, beyond a reasonable doubt. That right cannot be vindicated by the

Chapman standard of review, much less by petitioner's "could have/would have" test. For the right to have the jury decide one's fate is qualitatively different from the due process right recognized in *In re Winship, supra*, where a juvenile court judge sitting without a jury made the delinquency adjudication, or the prosecutorial misconduct that gave rise to *Chapman*, or the rebuttable presumption in *Yates*. Thus, this Court has repeatedly reminded lower courts that "[f]indings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime." *Cabana v. Bullock* 474 U.S. 376, 384-385 (1986) quoted in *Carella v. California, supra*, 491 U.S. at 269 [conc. opn. by Scalia, J.]. The "problem would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, 'the error in such a case is that the wrong entity judged the defendant guilty.'" *Rose v. Clark, supra*, 478 U.S. at 578, quoted in *Carella, supra*, 491 U.S. at 269.

This point could not have been made more clearly than it was most recently in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), where Justice Scalia, writing for a unanimous court, observed, in the context of an erroneous reasonable doubt instruction:

> "Harmless error review looks . . . to the basis on which 'the jury **actually rested** its verdict.' . . . [cit. omit.] [T]o hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings to support that verdict might be - would violate the jury-trial guarantee. . . . The most an appellate court can conclude is that a jury **would surely have found** petitioner guilty beyond a reasonable doubt -- not that the jury's actual finding of guilty beyond a reasonable doubt **would surely not have been different** absent the constitutional error. That is not enough. (cit. omit.) The Sixth Amendment requires more than appellate speculation

about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Sullivan, supra*, 508 U.S. at 278-280.

Whether or not, as petitioner argues, instructions which omit an element of the offense should be treated exactly the same as instructions that misstate, misdefine or misdescribe an element, makes no difference in this case. That is because in this case it is absolutely clear that the trial court told the jury in no uncertain terms that *the court* had already made the determination that the statements, if made, were material. "If you find that the defendant made one or more of the statements charged, *such statements were material matters within the definition of perjury.*"[14] This instruction did not merely ask the jury to "infer" or "conclusively presume" the existence of materiality from facts yet to found by the jury. By this instruction the court went beyond "omitting" an element of the offense: it announced to the jury that the decision on materiality had already been made by the court. Put differently, the instruction directed a partial verdict against the accused on one element of the offense. "The Constitution gives a criminal defendant the right to have a *jury* determine, beyond a reasonable doubt, his guilt of *every element* of the crime with which he is charged." *Gaudin, supra*, 115 S.Ct. at 2320; emphasis added.

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[14] This instruction was virtually identical to the one given to the *Kobrin* jury: "If you find the defendant made one or more of the statements [recited by the court as part of the instruction], said statements were material matters within the definition of perjury read to you." (*Kobrin, supra*, 11 Cal.4th at 416. It is also indistinguishable on any meaningful level from the instruction condemned by this Court in *United States v. Gaudin*, supra, __U.S.__; 115 S.Ct. 2310, 2313: "[t]he issue of materiality . . . is not submitted to you for your decision but rather is a matter for the decision of the court. You are instructed that the statements charged in the indictment are material statements."

Directing a partial verdict against the defendant on one element has the same effect, when there is a conviction, as directing a verdict against the defendant on all of the elements.[15] It results in a verdict that is not wholly a jury verdict.[16] Such a verdict cannot stand in a criminal case. *Sparf v. United States*, 156 U.S. 51, 105-106 (1895); *Carpenters v. United States, supra*, 330 U.S. 395, 410; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977); *Rose v. Clark, supra*, 478 U.s. at 578; *Carella v. California, supra*, 491 U.S. at 268; *Sullivan v. Louisiana, supra*, 113 S.Ct. at 2080. The reason underlying the rule is not so much logical as visceral: "The constitutional right to a jury trial embodies a 'profound judgment about the way in which law should be

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[15] See *People v. Lopez*, 71 F.3d 954 (1st Cir. 1995), cert. den., ___ U.S. ___, 116 S.Ct. 2529 (1996): "The precedents make clear that it could not be harmless error for the trial judge to direct a verdict on the case as a whole, [cit. omit.] and we think that the Court would apply the same analysis to a directed verdict on a single element of the offense. [Cit. omit.]" *Id.*, at 960; accord, *United States v. Johnson*, 71 F.3d 139, 142-143 (4th Cir. 1995) [dictum; aff'd on plain error doctrine]; *United States v. Ross*, 77 F.3d 1525, 1540 (7th Cir. 1996) [Same]; *United States v. Wells*, 63 F.3d 745, 751 (8th Cir. 1995) [vacating, without harmless error discussion, convictions in which materiality was removed from the jury], *cert. granted*, __U.S.__, 116 S.Ct. 1540 (1996). But see *United States v. Raether*, 82 F.3d 192 (8th Cir. 1996) [*Gaudin* error is subject to harmless error review, but finding it prejudicial under *Carella*-like test.]; *United States v. Baumgardner*, 85 F.3d 1305 (8th Cir. 1996) [Same].

[16] See, for example, *United States v. DiRico*, 78 F.3d 732, 737 (1st Cir. 1996): "[W]here a jury has not rendered a verdict that addresses every essential element of the charged offense, and therefore has not rendered a verdict on the crime charged, the question of whether the same verdict would have been rendered absent the constitutional error is meaningless. Here, because the jury did not determine whether the government had proved, beyond a reasonable doubt, the existence of an essential factual element of the crime of false subscription (*i.e.*, materiality) there was 'no jury verdict within the meaning of the Sixth Amendment' and harmless error analysis is inapplicable. [*Sullivan, supra*] at 278-81, 113 S.Ct. at 2081-82." Accord, *United States v. Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996).

enforced and justice administered.'" *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) quoted in *Carella, supra*, 491 U.S. at 268. Its infringement "abort[s] the basic trial process." *Rose v. Clark, supra*, 478 U.S. at 578, fn. 6 "The deprivation of that right. . . unquestionably qualifies as 'structural error.'" *Sullivan v. Louisiana, supra*, 508 U.S. at 282. Under this Court's precedents, then, "the trial judge's refusal to allow the jury to pass on the 'materiality' of [respondent's] false statements infringed that right [to a jury trial]. *Gaudin, supra*, 115 U.S. at 2320. The only corrective under the federal view of directed verdicts was reversal.

Petitioner's analysis of this case fails even under the *Yates* test for rebuttable presumptions. Petitioner posits that the jury "could have" considered evidence that the DMV issued the driver's license to respondent under a false name. But why should it have? That evidence was relevant only to the question whether the statements could have influenced the outcome of the proceedings. But that, of course, is the very question which, the jury was told, the court had already decided. The questions for the jury to decide, under the instructions, were: (1) did respondent sign the application under penalty of perjury? (2) was such a declaration permitted by law? (3) did respondent knowingly lie about (a) never having had a license, or (b) not having applied for a license under a different name within the past five years, or (c) his true name ? and (4) did he lie with the specific intent to lie? The jury did not need to ask or answer the question whether the DMV issued the license in order to answer questions 1 through 4. The jury *could have* engaged in the torturous set of inferences propounded by petitioner (Cert. Pet. p. 14) from the undisputed but largely irrelevant fact that the DMV issue the

license under a false name. But since it must be presumed that the jury followed the instruction to ignore materiality, there is nothing about the findings which the jury was required to make, which ineluctably lead to the conclusion that the jury even considered, much less *actually rested* its findings on the evidence of what the DMV did. Contrary to petitioner's assertions, there is no reliable basis for concluding that in this case "the *jury* returned a verdict of guilty beyond a reasonable doubt" on all the elements of perjury. Cert. Pet. p. 17, emphasis added.

Petitioner also takes aim at *Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996) because it doesn't agree with *Roy's* analysis, thought it apparently has no quarrel with *Roy's* result, or the approach which, petitioner asserts, parallel's its own approach to harmless error, and which *Roy* actually employed. Cert. Pet. p. 20. But *Roy* is not at issue in this case;[17] it was not even cited by the parties or the court of appeal. *Roy* is not a reason to grant certiorari in this case. Nor is petitioner's proposed all purpose harmless error test. It is incompatible with this Court's recent decisions, wrong in its analysis of this case,[18] and irrelevant in any event to the partial directed verdict rendered here.

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[17] But see the State of California's Petition for Certiorari in *Roy v. Gomez*, No. 95-2025, presently pending, , which does not ask the Court to grant review for the reasons urged here and, in fact, does not discuss or cite *Rose*, *Yates* or *Sullivan*.

[18] It bears repeating that the very fact-intensiveness of petitioner's analysis highlights why petitioner should have presented its theory to the court of appeal and why this court should not entertain in the first instance an argument which could and should have been made below.

III.

KOBRIN RESTS AS MUCH ON INDEPENDENT STATE GROUNDS AS ON FEDERAL PRECEDENT.

The California Supreme Court's opinion in *Kobrin* did not, in fact, go nearly as far as petitioner would have this Court believe. The *Kobrin* Court did not unequivocally hold that removal of an element of the offense for the jury is reversible error per se. Instead it only acknowledged that "both this court and the United States Supreme Court have strongly implied that omitting to instruct on an element of an offense" is an error that "infects the structural integrity of the trial process . . . [and] is reversible per se." *Kobrin, supra*, 11 Cal.4th at 428. In a footnote, the court was quick to point out that such error could be found harmless if "'it is possible to determine that although an instruction ... was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.'" *Id.* at 428 fn. 8, citing *People v. Sedeno*, 10 Cal.3d 703, 721; 112 Cal.Rptr. 1; 518 P.2d 913 (1974).[19] The Court expressly declined to decide "whether, and under what circumstances, a reviewing court may determine the omission of instruction on an element was harmless beyond a reasonable doubt." *Id.*

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[19] Although petitioner at first complains that *Kobrin* "expressly declined to set forth a test under which [an omitted instruction] . . . would actually be harmless," citing *Kobrin's* footnote 8, petitioner later acknowledges that the *Kobrin* Court did set forth the *Sedeno* test, though petitioner does not use that name. Cert. Pet. p. 18.

The citation to California's venerable "*Sedeno* test" speaks volumes about the twin constitutional principles which underlie the *Kobrin* opinion.[20] Coupled with the fact that the defense briefing in *Kobrin* urged the Court to find that the state Constitution provided an alternate ground for its decision (see Appx F. [attached]), the citation to *Sedeno* underscores that *Kobrin* does rest, in part, on the state constitutional right to a jury trial. As an incident of the right to a jury trial and due process under the state Constitution, Californians enjoy a "constitutional right to have the jury determine every material issue presented by the evidence." *People* v. *Modesto*, 59 Cal.2d 722, 730; 31 Cal.Rptr. 225; 382 P.2d 33 (1963); *People* v. *Sedeno*, *supra*, 10 Cal.3d at 720; *People* v. *Geiger*, 35 Cal.3d 510, 519; 199 Cal.Rptr. 45; 674 P.2d 1303 (1984).[21] Because an instructional error which deprives a defendant of the right to a jury determination of

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[20] In *People* v. *Ernst*, 8 Cal.4th 441; 34 Cal.Rptr.2d 238; 881 P.2d 298 (1994), the California Supreme Court reaffirmed that the state Constitution protects the right to a jury trial even more zealously than the federal Constitution. The California Constitution describes trial by jury trial as "an inviolate right." Cal. Const., art. I § 16. Indeed, even an error which might be subject to harmless error analysis under federal law (e.g., absence of an express personal waiver of a jury) may be deemed reversible per se under the California Constitution. "It long has been established that the denial of the right to a jury trial constitutes a '"a structural defect[]" in the judicial proceedings"' that, by its nature, results in such '"a miscarriage of justice."'" *Ernst*, *supra*, 8 Cal.4th at 449.

[21] A Californian's right to instructions on lesser included and related offenses, and defenses, also derives primarily from this state constitutional mandate. To date, this Court has not recognized a comparable federal constitutional right in noncapital cases (see *People* v. *Geiger*, *supra*; *People* v. *Garrison*, 47 Cal.3d 746, 779; 254 Cal.Rptr. 257; 765 P.2d 419 (1989); *People* v. *Murtishaw*, 48 Cal.3d 1001, 1014 fn. 2; 258 Cal.Rptr. 821; 773 P.2d 172 (1989), cert. den., 497 U.S. 1010 (1990) [*Murtishaw* II]) although it has recognized such a right in capital cases. *Beck* v. *Alabama*, 447 U.S. 625, 638, 643 (1980).

every material issue raised by the evidence is a "miscarriage of justice" in itself under the state constitution, such error was originally considered presumptively prejudicial, and reversible per se. *People v. Carmen*, 36 Cal.2d 768, 773; 228 P.2d 281 (1951); *People v. Modesto, supra*, 59 Cal.2d at 730[22]. In *People v. Sedeno, supra*, however, the Court recognized a narrow exception to the rule of automatic reversal, holding:

> "[I]n some circumstances it is possible to determine that although an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury." 10 Cal.3d at 721.

While the *Sedeno* test is most commonly associated with the failure to instruct on a defense or lesser offense,[23] an instruction which entirely removes a distinct element

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[22] As Justice Traynor explained for the majority in *Modesto*, "[r]eversal is not required because of a reasonable probability that in the absence of the error the jury would have reached a different verdict [citation omitted], but because the defendant has a constitutional right to have the jury determine every material issue presented by the evidence. Regardless of how overwhelming the evidence of guilt may be, the denial of such a fundamental right cannot be cured by article VI, section 4 1/2 [now § 13], of the California Constitution, for the denial of such a right itself is a miscarriage of justice within the meaning of that provision." 59 Cal.2d at 730.

[23] See e.g., *People v. Wickersham*, 32 Cal.3d 307, 335; 185 Cal.Rptr. 436; 650 P.2d 311 (1982); *People v. Ramkeesoon*, 39 Cal.3d 346, 352; 216 Cal.Rptr. 455; 702 P.2d 613 (1985); *People v. Geiger, supra*, 35 Cal.3d at 532; *People v. Melton*, 44 Cal.3d 713, 746-747; 244 Cal.Rptr. 867; 750 P.2d 741 (1988), cert. den., 488 U.S. 934 (1988); *People v. Edelbacher*, 47 Cal.3d 983, 1028; 254 Cal.Rptr. 586; 766 P.2d 1 (1989); *People v. Turner*, 50 Cal.3d 668, 690-693; 268 Cal.Rptr. 706; 789 P.2d 887 (1990), cert. den., 498 U.S. 1053 (1991). [*Sedeno* applied to lesser included and related offenses] See also *People v.*

(continued...)

of an offense from the jury's consideration also eviscerates that right. The California Supreme Court recently acknowledged as much, when it held that the *Sedeno* test is the appropriate standard for instructional error going to the definition of the core elements of a charge. Thus, in *People* v. *Sheldon*, 48 Cal.3d 935, 961-962; 258 Cal.Rptr. 242; 771 P.2d 1330 (1989), the Supreme Court applied *Sedeno* to the failure to define the term "assault" in instructions on assault with a deadly weapon. Demonstrating the rigors of the *Sedeno* test, *Sheldon* held that the jury's verdict on a firearm use enhancement did not necessarily mean that the jury had determined, adversely to the defendant, the precise factual questions posed by a proper definition of assault.

Application of the *Sedeno* test to the error in *Kobrin* and in this case yields the same result. At least in *Sheldon*, the instructions on assault with a deadly weapon referred to the element of assault; the error lay simply in failing to define that term of art. In *Kobrin*, by contrast, the jury received no instructions at all suggesting that it was required to assess the materiality of appellant's statements to the specific judicial

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[23](...continued)
153-158; 125 Cal.Rptr. 745; 542 P.2d 1337 (1975); *People* v. *Stewart*, 16 Cal.3d 133, 138, 141-142; 127 Cal.Rptr. 117; 544 P.2d 317 (1976); *People* v. *Wickersham, supra*, 32 Cal.3d 307, 335-336 ["defense" of nonpremeditated, nondeliberate intentional murder]; *People* v. *Jackson*, 49 Cal.3d 1170, 1199; 264 Cal.Rptr. 852; 783 P.2d 211 (1989), cert. den., 498 U.S. 881 (1990) ["defense" of implied-malice second degree murder].

The California Supreme Court has also occasionally applied a *Sedeno*-type analysis to instructional errors which implicate federal as well as state constitutional rights. However, the Supreme Court's application of *Sedeno* to errors which do *not* offend the federal constitution--such as refusal to instruct on a lesser related offense--demonstrates that the *Sedeno* test is a state constitutional requirement which exists independently of federal constitutional standards. See *Geiger, supra*, 35 Cal.3d at 519-520, 532.

proceeding in which they were submitted. On the contrary, the court announced its own finding on the materiality element. Furthermore, the omitted element of materiality was qualitatively different than any of the elements submitted to the jury. Thus, the jury had no occasion, under other instructions, to render any findings necessarily determining those elements. *Kobrin* presented as grave a violation of the right to a jury determination of material issues as any California reviewing court was likely to encounter. Thus, both the *Kobrin* Court and the court below were obliged to reverse, on completely independent state grounds. That being so, this Court should decline to review the correctness of the reasoning or result in this case.

Finally, as discussed in Part I, *supra*, to the extent that the *Mitchell* opinion itself does not provide a more detailed discussion of the bases of its finding of reversible error, the fault lies with petitioner, which declined to raise any harmless error argument in the Sixth Appellate District. Because the state was not arguing harmless error, the state appellate court had no need and no occasion to elaborate on the state law underpinnings of its disposition. See *Illinois* v. *Gates*, 462 U.S. at 222; see also *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 80 (1988).

CONCLUSION

In sum, this is the wrong case in which to attempt a definitive resolution of any questions left open by this Court's recent opinions, for numerous reasons. First, the question presented to this Court and the California Supreme Court was never presented to the intermediate court which rendered the decision the State now wants this Court to review. Second, because the particular type of element-removing instruction given here is a partial directed verdict, it will not help this Court answer whatever questions may remain regarding the proper standard of reversal for instructional errors that omit, confuse or otherwise remove an element of the offense from the jury's consideration. Finally, the conclusion of the intermediate court was correct not only as a matter of federal constitutional law, but of state constitutional law as well. The petition for writ of certiorari should be denied.

Dated: September 9, 1996

Respectfully submitted,

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PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

APPENDIX A

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JESS RODERICK MITCHELL, Defendant and Appellant.	)	Case No. H012785 Santa Clara County Case No. 164364/168432

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA

Honorable Thomas C. Hastings, Judge

APPELLANT'S OPENING BRIEF

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VIII

THE COURT ERRED BY INSTRUCTING THAT CERTAIN STATEMENTS WERE MATERIAL AS A MATTER OF LAW IN REGARD TO THE PERJURY CHARGE IN COUNT TEN

Mr. Mitchell was charged in count ten with having committed perjury in violation of section 118 in regard to an application for a California driver's license. (CT p. 908.) In its instruction of the jury as to that count, the court directed that the allegedly false statements were material matters within the meaning of the elements of the offense, thus removing the question of materiality from the jury. (CT pp. 1051-1052.)

Mr. Mitchell notes that this court, finding itself bound by California precedent, recently held that the issue of materiality in a perjury prosecution is properly decided by the court rather than the jury. (People v. Jiminez (1992) 11 Cal.App.4th 1611.) Significant events have occurred since that decision.

On February 3, 1994, the California Supreme Court granted review in People v. Kobrin, S036656 [formerly published at 29 Cal.App.4th 1114], a case which raises this issue and which is still pending. The Supreme Court ruled on a related issue, however, on March 2, 1995, in People v. Wiley (1995) ___ Cal.4th ___ [95 C.D.O.S. 1618, case number S034307], that the question whether a prior conviction was on charges brought and tried separately vis-a-vis a sentencing enhancement was a question of law to be decided by the court even though the validity of the prior conviction generally was submitted to the jury. Significantly, this was a 4-3 decision, with the majority placing substantial reliance on the fact this was a question involving sentencing, traditionally a matter within the province of the court. Thus, given the closeness of this decision and the difference in kind from the question presented in Kobrin, by no means is Wiley an

indicator that Kobrin will be decided with the same result. Indeed, as this court noted in Jiminez, the Supreme Court observed in People v. Figueroa (1986) 41 Cal.3d 714 that the continuing validity of earlier precedent that materiality is a question of law for the court in a perjury prosecution is in doubt in light of modern due process requirements. (People v. Jiminez, supra, 11 Cal.App.4th at p. 1622.)

In United States v. Gaudin, supra, the Ninth Circuit decided very clearly that due process, as well as the Sixth Amendment, does require the question of materiality to be decided by the jury. "However, when the judge rules that a false statement is material, and withdraws the element of materiality from the jury, the judge deprives the jury of its fact-finding duty and violates the defendant's Due Process and Sixth Amendment rights." (28 F.3d 943, 951.)

The Supreme Court's grant of certiorari on January 6, 1995, of course suggests that guidance from that court may be forthcoming not long after the anticipated decision of the California Supreme Court in Kobrin.

For now, Mr. Mitchell of course urges that the analysis of the Ninth Circuit in Gaudin is the correct view. Moreover, given the implications of his Sixth and Fourteenth Amendment rights on this issue, this court can properly place great reliance of the analysis of the federal courts. That fact, together with the very real possibility of a change in California Supreme Court jurisprudence in Kobrin, as hinted in Figueroa and as arguably suggested by the result in Wiley, Mr. Mitchell submits this court should not feel bound by a rigid application of Auto Equity Sales, Inc. v. Superior Court, supra, 57 Cal.2d 450 to long-in-the-tooth, now-questionable California Supreme Court precedent.

As discussed in Argument VI, an instructional error such as this, which entirely removes an element of the offense from the jury's consideration, is reversible per se. Thus, the judgment of conviction must be reversed as to count ten.

VII

COUNT SIX MUST BE REVERSED BECAUSE THE COURT FAILED TO INSTRUCT ON AN ESSENTIAL ELEMENT OF THE OFFENSE; IF NOT REVERSED, IT MUST BE REDUCED TO A MISDEMEANOR

A. The Instructional Error

Mr. Mitchell was charged in count six with fraudulent use of an access card in violation of section 484G(A) on September 8, 1992. (CT p. 906.)[47] The factual basis for this charge, according to the prosecutor's argument to the jury, was the use of Mr. Mirshafiei's credit card in the attempt by Mr. Russell to purchase tires and wheels from Zenith Wire Wheel Company. (See 11 RT p. 2623.)[48]

In its instructions to the jury in regard to this count, the court failed to instruct that an essential element of the charged crime was that the credit card must have been stolen. The court's instructions on the elements of the offense were as follows: "In order to prove such a crime, each of the following elements must be proved: 1. A person used an access card for the purpose of obtaining money, goods, services or anything of value, 2. The person used the access card by representing without consent that he was the holder of the access card, and 3. At the time of such use, the person had the specific intent to defraud." (CT p. 1047; 11 RT p. 2748.)[49]

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[47] Section 484g provides in pertinent part as follows: "Every person, who with intent to defraud, (a) uses for the purpose of obtaining money, goods, or services or anything else of value an access card obtained or retained in violation of Section 484e . . ." Section 484e, in turn, defines theft of an access card.

[48] The prosecutor also discussed in his jury argument the purchase of a Walkman from an appliance store with the credit card. (11 RT pp. 2689-2690.)

[49] This was a special instruction, not from CALJIC. The instruction tracks more closely the offense defined in part (b) of section 484g rather than the crime with which Mr. Mitchell was charged and as to which the jury returned a guilty verdict. Mr. Mitchell notes the prosecutor's

The prosecution presented evidence that the card was stolen. However, no amount of evidence makes up for the absence of a jury finding on an essential element, a defect which naturally flows from the court's failure to instruct on an essential element, because the absence of a jury finding equates to a denial of a jury trial on the offense, a violation of the Sixth Amendment and a structural defect as to which harmless error analysis is therefore inappropriate. (See Osborne v. Ohio (1990) 495 U.S. 103 [109 L.Ed.2d 98] [failure to instruct on an element of the offense resulted in reversal without any discussion of harmless error]; United States v. Gaudin (9th Cir. 1993) 997 F.2d 1267, rehearing en banc, (1994) 28 F.3d 943, cert. granted January 6, 1995; see also People v. Cummings (1993) 4 Cal.4th 1233 [failure to instruct on substantially all elements is reversible per se].)

Thus, the judgment of conviction should be reversed as to count six.

B. The Sentencing Error

The plain language of section 484g provides the offense is grand theft only if the goods fraudulently obtained had a value greater than $400. The wheels and tires which were ordered had a retail price of $2,600. (3 RT p. 338.) However, those goods were never delivered. The prosecution produced evidence that other items were actually purchased with the card, but there was no evidence the value of those items exceeded $400. (2 RT pp. 1432-1433.)[50]

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argument to the jury omitted the same element as the court's instruction. (11 RT pp. 2682-2683.)

[50] Should the prosecution argue on appeal the conviction should be reduced to attempted grand theft rather than misdemeanor petty theft, this argument must fail because the prosecutor did not request, and the court did not give, CALJIC No. 17.01, requiring jury unanimity as to the factual basis for this count. When the jury has returned a verdict as to a completed offense which was charged, an appellate court should not substitute a verdict as to an attempted offense, which was not charged, under these circumstances. If the conviction is not reversed and is not reduced to a misdemeanor, rather than reduce the verdict to attempted grand theft, the case would have to

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JESS RODERICK MITCHELL, Defendant and Appellant.	H012785

Santa Clara County Superior Court No. 164364, 168432
The Honorable Thomas C. Hastings, Judge

RESPONDENT'S BRIEF

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VIII.

THIS COURT IS BOUND BY PRECEDENT TO HOLD THAT MATERIALITY IS A QUESTION FOR THE TRIAL COURT IN PERJURY CASES.

Appellant concedes this Court held in *People* v. *Jimenez* (1992) 11 Cal.App.4th 1611, 1622-1623, review den. Apr. 1, 1993, that controlling precedent compelled it to find that the issue of materiality in a perjury prosecution such as this one is properly decided by the trial court rather than the jury. (AOB 55.)

However, believing this precedent is "long-in-the-tooth," appellant urges the Court to "not feel bound by a rigid application" of *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455. He points to conflicting Ninth Circuit case law interpreting the federal perjury statute (in which certiorari has been granted), and to the fact that the California Supreme Court has granted review on this question. (AOB 55-56, citing *People* v. *Kobrin*, No. S036656, and *United States* v. *Gaudin* (9th Cir. 1994) 28 F.3d 943, cert. granted, 115 S.Ct. 713 [argued Apr. 17, 1995].)

We respectfully respond that until the law is actually changed by a higher court, if it is, this Court continues to be bound by existing precedent. The trial court did not err. (*Jimenez*; *Auto Equity Sales, Inc.*.)

VII.

THE TRIAL COURT DID NOT ERR IN ITS CREDIT CARD FRAUD INSTRUCTIONS; ANY ERROR WAS HARMLESS.

Appellant contends his conviction of fraudulent use of an access card (count 6) must be reversed because the trial court did not instruct on an essential element, viz., that the credit card must have been "stolen." (AOB 52-53.)

Penal Code section 484g(a), under which appellant was charged (CT 906), does not require proof that the credit card was stolen. It requires proof of "use" of a credit or access card that was "obtained or retained in violation of Section 484e" and which the user knows is forged, expired, or revoked. Penal Code section 484e(a) penalizes any person who "acquires an access card from another without the cardholder's or issuer's consent or who, with knowledge that it has been so acquired, acquires the access card, with intent to use it . . . ." Penal Code section 484e(c) penalizes anyone who "receives an access card with the intent to defraud" or "acquires an access card with the intent to use it fraudulently . . . ."

Thus, theft exists by statutory definition whenever a defendant "uses" a credit card that was "received" or "acquired" and "obtained or retained" without the cardholder's consent and with "intent to use it," or with "intent to defraud." The jury need not find the card was "stolen," but only that it was obtained, retained and used without consent or with intent to defraud.

The trial court's instruction to the jury tracked more closely the language of Penal Code section 484g(b) than subsection (a),[7/] but the

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7. Penal Code section 484g provided at the time of the crime:

"Every person, who with intent to defraud, (a) uses for the purpose of obtaining money, goods, services or anything else of value an access card obtained or retained in violation of Section 484e or an access card which he or she knows is forged, expired, or revoked, or (b) obtains money, goods, services, or anything else of value by representing without the consent of the cardholder that he or she is the holder of an access card or by representing that he or she is the holder of an access card and the card has not in fact been issued, is guilty of theft. If the value of all money, goods, services and

elements defined in the instruction also fit the requirements of subsection (a). The court instructed the jury:

> "In order to prove this crime, each of the following elements must be proved: One, a person used an access card for the purpose of obtaining money, goods, services or anything else of value. Two, the person used the access card by representing without consent that he was the holder of the access card. And three, at the time of such use, the person had the specific intent to defraud." (RT 2748.)

Thus, among the elements the jury had to find were "use," "without consent" and "specific intent to defraud." We submit these findings established a violation of either Penal Code section 484e(a) or 484e(c).

In addition, appellant was charged in count 5 with receiving stolen property, to wit, credit cards. (CT 906.) The court's instructions required proof that the cards "had been stolen." (RT 2747.)

Thus, it is not reasonably likely, considering the instructions as a whole, that the jury did not understand and apply each element required by section 484g. There was no error. (E.g., *Boyde v. California* (1990) U.S. 370, 380; *People* v. *Berryman* (1993) 6 Cal.4th 1048, 1073, fn. 3; *People* v. *Clair* (1992) 2 Cal.4th 629, 663.)

Further, since the jury did unquestionably under other correct instructions find that the card was stolen, any arguable error was harmless. (*People* v. *Sedeno* (1974) 10 Cal.3d 703, 720-721.)

Appellant's subsidiary claim that the conviction must be reduced to petty theft because he did not in fact secure possession of property proved to be worth at least $400 (AOB 53-54) fails because he was proved to have acquired the credit card with specific intent to defraud. Under Penal Code section 484e(c), acquiring a card with such intent by definition constitutes grand theft. The provision in Penal Code section

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other things of value obtained in violation of this section exceeds four hundred dollars ($400) in any consecutive six-month period, then the same shall constitute grand theft."

484g, defining as grand theft the obtaining of money, good, services, et cetera, worth in excess of $400 "in any consecutive six-month period" is an alternative means of establishing grand theft, and not the exclusive means. Section 484g(a) expressly incorporates section 484e as a means of violating section 484g when the card is "used." Since acquiring the card with intent to defraud is grand theft, *use* of a card so acquired cannot be less.

APPENDIX C

*** C O P Y ***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

SIXTH APPELLATE DISTRICT

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APPELLATE PROJECT

PEOPLE OF THE STATE OF CALIFORNIA
vs.
MITCHELL, JESS R.
H012785
Santa Clara County No. 164364

FILED
SEP 18 1995
Court of Appeal - Sixth App. Dist.
DEPUTY

BY THE COURT

Oral argument in the above entitled cause will be heard on

OCTOBER 3, 1995 AT 1:30 PM

in the Courtroom, 333 West Santa Clara Street, Suite 1060,

San Jose, California.

Stanley, David
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APPENDIX D

Supreme Court of Califo..lia

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June 20, 1995

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Re: S036656 - People v. Kobrin

Dear Counsel:

The court requests supplemental briefing on the issues of whether the materiality element of Penal Code section 118 is a question of law for the court or of fact for the jury in light of the United States Supreme Court's decision in *United States v. Gaudin* (94-514, decided June 19, 1995) 1995 W.L. 360212. The parties should also address the issue of whether any instructional error was prejudicial. Supplemental briefs are to be filed simultaneously and are due July 5, 1995; any response from either party will be due July 12, 1995.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

By: John C. Rossi
Assistant Clerk-
Administrator

JCR:sf

cc: Rec.
Reg.
L.A.

APPENDIX E

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. NATHAN PAUL KOBRIN, Defendant and Appellant.

S036656

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First District
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First Appellate District, Division Five, No. A058595
Contra Costa County Superior Court No. 920264-9
The Honorable Edward L. Merrill, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **NATHAN PAUL KOBRIN,** Defendant and Appellant.	S036656

INTRODUCTION

In a letter dated June 20, 1995, the Court requested supplemental briefing in light of *United States* v. *Gaudin* (1995) 95 C.D.O.S. 4634 on the questions of whether, in a perjury prosecution under Penal Code section 118, "materiality" is a question for the jury and, if it is, whether any instructional error in this case was prejudicial.

This brief contains seven parts. We begin by explaining why "materiality" is an element of perjury as that crime is defined in section 118. (Part I.) The remainder of the brief addresses the interrelated issues of error and prejudice. Summarizing how a reviewing court must analyze claims of erroneous instructions on elements of an offense, we set forth a "jury findings, evidence considered" approach. (Part II.) Next, we consider a conflicting approach, a so-called "instruction characterization" method, and demonstrate why it is not only incorrect but nonsensical. (Part III.) In the next two sections, we lay the conceptual groundwork for our review of the major cases in this area. First, we distinguish the "jury findings, evidence considered" approach from two other approaches: a so-called "contributing principle" test and a so-called "same result" test. Unlike the "instruction characterization" approach, these two are at least coherent, if not correct. (Part IV.) Next, we show that any given harmless error approach is a formulation of the